United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,695

GERALD D. GREENFIELD,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

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Appeal from Judgment of The
United States District Court
For the District of Columbia

William W. Greenhalgh
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Counsel for Appellant
(Appointed by this Court)

Washington, D. C.
September , 1964

STATEMENT OF QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to instruct the jury on the lesser-included offense of simple assault (D.C. Code §22-504) when such instruction was supported by the evidence.

2. Whether the trial court erred in only instructing the jury as to what constituted self-defense by use of a dangerous weapon.

I N D E X

SPECIFICATION OF POINTS ON APPEAL

The evidence tended to show that appellant had an argument with a store-clerk, Clarence Ivory, in a small carry-out shop. Appellant took the stand and admitted that he had struck Ivory on the head with a soft drink bottle which he had picked up in the store (Tr. 117, 123, 132-135). However, appellant also testified that he was only responding to a pop bottle thrown at him immediately beforehand by Clarence Ivory (Tr. 116, 117, 123, 124, 132-135). This testimony was corroborated by Ivory's fellow clerk, James R. Vick (Tr. 71, 72) and by appellant's co-defendant, Anthony Taggart (Tr. 95-97), both of whom were eye-witnesses. The Court refused to instruct on the lesser included offense of simple assault indicating the blow with the bottle was "assault with a dangerous weapon or nothing" (Tr. 148, 163, 164, 174).

In the court's instructions to the jury (and later, in answer to a jury inquiry) the trial judge gave the jury a rule of law regarding self defense by use of a dangerous weapon. This did not give the jury the opportunity to ascertain whether a dangerous

weapon had been used, and if not, whether the return blow with the pop bottle was justifiable on grounds of self defense.

With respect to the questions presented, appellant desires the Court to read the following pages of the Reporter's Transcript: Tr. 71, 72, 83, 95, 96, 117, 123, 124, 132-135, 148, 149, 163, 164, 165, 174, 176, 177.

TABLE OF AUTHORITIES

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JURISDICTIONAL STATEMENT

Gerald D. Greenfield, the appellant, was convicted in the United States District Court for the District of Columbia of violating D. C. Code (1961) §22-502, Assault With A Dangerous Weapon. He had also been charged with Robbery and Housebreaking, but was

acquitted on those two counts. The District Court had jurisdiction to try appellant for such offenses, 18 U.S.C. §3231. Judgment of conviction was entered on May 22, 1964 and appellant's motion for leave to prosecute an appeal without prepayment of costs was granted on June 3, 1964. This Court has jurisdiction upon appeal to review the judgment of the District Court.

STATEMENT OF THE CASE

On January 2, 1964 at 12:25 A. M., the appellant, Gerald D. Greenfield, entered the small carry-out shop at 2808-A 14th Street, N. W. in the District of Columbia. The clerk in charge, Clarence Ivory, was preparing to terminate his workshift (Tr. 8); he was to be replaced at 12:30 A. M. by a fellow employee, James R. Vick (Tr. 23). According to the appellant, after Ivory had served him a soft drink in a bottle, Ivory reached for appellant's privates which resulted in an argument during which Ivory threw a soda pop bottle at appellant who in turn threw one at Ivory (Tr. 116, 117, 134, 135). Testimony by James R.

Vick, Ivory's fellow employee and a co-defendant Anthony Taggart both of whom arrived immediately after the argument had commenced, corroborated appellant's testimony that the complaining witness, Ivory, had thrown the first bottle (Tr. 71, 72, 83, 95, 96). During the above-mentioned incidents the cash register had fallen to the floor (Tr. 73).

Appellant Greenfield, was, along with Anthony Taggart, indicted for Robbery, Housebreaking, and Assault With A Dangerous Weapon. The trial was held on April 7 and 8, 1964. At the trial, the judge rejected a request by counsel for defendant Greenfield that an instruction on the lesser-included offense of simple assault be given (Tr. 148, 163, 164, 174). Also, over defendant's objection the trial judge instructed on the justification of self-defense by use of a dangerous weapon (Tr. 149, 165).

The jury returned a complete acquittal for defendant Taggart, and acquitted defendant Greenfield of both Housebreaking and Robbery. He was convicted of Assault With A Dangerous Weapon and on May 22, 1964 was given a sentence of five to twenty-one months imprisonment with no credit for over three months he had previously spent in jail. This appeal followed.

ARGUMENT

I

THE COURT BELOW ERRONEOUSLY REFUSED AN INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF SIMPLE ASSAULT, ALTHOUGH THE EVIDENCE JUSTIFIED SUCH AN INSTRUCTION.

The evidence tended to show that the appellant had struck the complaining witness with a soda pop bottle. In fact, the blow was admitted by the appellant (Tr. 117, 123, 132, 135) during the trial. Appellant was relying on self-defense to prevent his conviction. A soda bottle is not, per se, a dangerous weapon. Cf. Josey v. United States, 135 F.2d 809 (D.C. Cir. 1943). Also the jury could have believed that appellant did not use the bottle in such a manner as to inflict grevious bodily injury. The testimony was that the appellant gave the complaining witness only one blow, a bop on the head, and then left the premises. (Tr. 123, 135) The complaining witness did testify that four stitches were used to "fix" his head, but it is clear that whether or not the jury believed that testimony did not foreclose the issue of whether there was an assault with a dangerous weapon under D.C. Code §22-502. An instruction on simple assault is required even where the explanation which the jury is

asked to accept is "implausible, unreliable and incredible" or the source "could well be regarded as of dubious reliability." Young v. United States, 309 F.2d 662 (D.C. Cir. 1962); Hunt v. United States, 316 F.2d 652 (D.C. Cir. 1963). The trial court was clearly in error when it denied an instruction on simple assault. (Tr. 148, 163, 164, 174). Closely related to this error was the instruction of the court on the matter of self-defense in which the court assumed the use of a dangerous weapon (Tr. 149, 165, 176, 177). That point is more fully discussed in the succeeding argument.

ARGUMENT

II

THE COURT BELOW ERRONEOUSLY INSTRUCTED THE JURY ON SELF DEFENSE BY USE OF A DANGEROUS WEAPON.

In accordance with the trial court's holding that, as a matter of law, the blow with the soda pop bottle was an assault with a dangerous weapon (Tr.148), the instruction on self defense assumed the use of a dangerous weapon (Tr. 165). This was objected to by appellant's trial counsel (Tr. 149). The instruction

was prejudicial to appellant's defense for two important reasons. First, by assuming the use of a dangerous weapon it precluded any doubt on the part of the jury that a dangerous weapon had been used by the appellant. Second, it made it more difficult for the jury to find self-defense as a bar to conviction. This is especially so because the error was compounded when the very same instruction was repeated to the jury in response to its question approximately two hours after it had returned to deliberate, but only twenty minutes before informing the Marshal of a verdict (Tr. 176, 177).

Appellant had no opportunity for a fair determination on the issue of simple assault or self defense without use of a dangerous weapon.

CONCLUSION

Wherefore, it is respectfully submitted, the judgment of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

William W. Greenhalgh

Bernard M. Dworski

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Washington, D. C. 20001

Counsel for Appellant
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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GERALD D. GREENFIELD, APPELLANT

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
DAVID W. MILLER,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. Whether, in a prosecution for assault with a dangerous weapon, the trial court erred in refusing to instruct the jury on the lesser-included offense of simple assault when such an instruction was not supported by the evidence.

2. Whether the trial court's instructions on self-defense erroneously prejudged a factual issue which should have been left to the jury's determination.

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was convicted of assault with a dangerous weapon, D.C. Code § 22-502 (1961), and sentenced to imprisonment for five to twenty-one months.[1] This appeal followed.

[1] Appellant and Anthony Taggart were indicted jointly on February 17, 1964, for robbery, D.C. Code § 22-2901 (1961), housebreaking, D.C. Code § 22-1801 (1961), and assault with a dangerous weapon, D.C. Code § 22-502 (1961). Upon pleas of not guilty, trial by jury commenced April 7, 1964, before Judge Charles J. McLaughlin. On April 8, 1964, the jury returned a verdict of not guilty on all counts as to Taggart, not guilty of robbery and housebreaking as to appellant, and guilty of assault with a dangerous weapon as to appellant. Appellant was sentenced by judgment and commitment filed May 22, 1964.

The evidence adduced at trial proved conclusively that on January 2, 1964, in the District of Columbia, appellant assaulted Clarence D. Ivory with a soft-drink bottle, causing a laceration which required medical treatment.

Clarence D. Ivory testified at trial that at about 12:25 A.M., January 2, 1964, he was at his place of employment, a small "carry-out" shop at 2808-A 14th Street, Washington, D.C., when four persons, including appellant, came down the street (Tr. 8-9). Two of these persons, including appellant, entered the shop, while the other two stood in the doorway (Tr. 9-10). Appellant came over to Mr. Ivory, said "this is a hold-up," and started "arguing" with and swearing at him (Tr. 10-11, 21). Mr. Ivory asked appellant if he wanted anything. Appellant came around behind the counter where Mr. Ivory was standing. Mr. Ivory tried to push appellant away, and appellant left the store (Tr. 10-11). Mr. Ivory observed appellant remove his coat and hand it to one of his companions, Anthony Taggart, co-defendant below (Tr. 12). The two then re-entered the store. Appellant walked over to the cash register, opened it, reached in, and then "slung" it onto the floor, smashing it. (Tr. 12.) He then picked up an empty soft-drink bottle in front of the counter and "cracked" Mr. Ivory "across the head" with it (Tr. 13, 15). Mr. Ivory became dizzy and was later taken to Washington Hospital Center where he was treated for a laceration which required four stitches to close (Tr. 13, 16). Mr. Ivory testified that, other than trying to push appellant out from behind the counter when appellant was first in the shop, at no time did he touch, strike, or throw anything at appellant (Tr. 13, 23, 32, 45).

James Powell Ganley, a medical doctor on the staff of Washington Hospital Center, testified that he was on duty when Mr. Ivory was brought in for treatment around 1:25 A.M., January 2, 1964. He examined Mr. Ivory before and after treatment. The medical record showed that Mr. Ivory was treated for a laceration to the scalp

and that a piece of glass was removed from the wound (Tr. 48, 53).

James R. Vic testified for the defense that he entered the "carry-out" shop on the night in question as appellant and Mr. Ivory were "arguing". He did not recall the nature of the "argument". (Tr. 71.) He saw some "stuff" fly across the counter and strike the door and then saw appellant hit Mr. Ivory over the head with a bottle as Mr. Ivory was "coming across the counter" (Tr. 71-72, 83-84). The bottle shattered and Mr. Ivory was injured by it (Tr. 83-84). He could not identify the "stuff" which had hurtled through the air before this blow and could only surmise that Mr. Ivory must have thrown it because of the direction from which it came (Tr. 76, 83). He did not hear any mention of a robbery and did not see appellant reach into the cash register or take any money (Tr. 72-73).

Anthony Taggart, co-defendant below, testified for the defense that he and appellant had just left a bar next door to the "carry-out" shop, when appellant met Mr. Vic on the sidewalk and had a conversation with him (Tr. 93-94, 102-103). Afterwards, appellant went into the "carry-out" shop to buy a soft drink (Tr. 94). Mr. Taggart followed him inside, carrying appellant's coat, which appellant had left in the bar (Tr. 94, 102-103). When Mr. Taggart stepped inside the "carry-out" shop, appellant and Mr. Ivory were arguing (Tr. 94, 104). Mr. Ivory threw a Pepsi-Cola bottle which hit appellant on the shoulder (Tr. 95-97, 104-106). Mr. Taggart did not see appellant take any money or strike Mr. Ivory (Tr. 97-98, 193-04). He heard nothing about a "stick-up" (Tr. 98). After Mr. Ivory had thrown the bottle, Mr. Taggart and appellant left the shop; they returned later to apologize to the owner (Tr. 96). Mr. Taggart admitted a prior conviction of assault (Tr. 108).

Appellant testified that, after leaving the bar next door, he talked briefly with Mr. Vic and then entered the "carry-out" shop, where he ordered a soft drink from Mr. Ivory (Tr. 116, 130-131). Mr. Ivory placed the drink on the

counter, reached out, and touched appellant around his privates. An argument ensued. During the argument, Mr. Ivory picked up the soft drink which appellant had ordered and threw it at appellant, hitting him on the shoulder (Tr. 116). Appellant then turned, picked up an empty soft-drink bottle from those that were stacked by the door, and hit Mr. Ivory in the head with it (Tr. 117, 135). Although he claimed that he did not "intend to inflict great bodily damage" on Mr. Ivory (Tr. 123), he admitted that the bottle broke when he hit Mr. Ivory with it (Tr. 137). Appellant denied taking any money or saying "this is a stick-up" (Tr. 116, 120). Appellant admitted prior convictions of destroying private property (Tr. 137), indecent act, false pretenses, and petit larceny (Tr. 139).

On this testimony, the trial court refused appellant's requested instruction on the lesser included offense of simple assault (Tr. 148, 174). He instructed the jury on self-defense as follows:

> "In that connection you are instructed if you find that the defendant Gerald Greenfield was threatened with bodily harm by Clarence Ivory, and if you find the threat of assault was sufficiently serious and grave, then the question arises whether the defendant Gerald Greenfield acted in self-defense. Of course, if the defendant acted in self-defense your verdict will be not guilty as to Count Three of the indictment, because the law recognizes self-defense as a valid defense. Self-defense is the law of necessity. Every human being has the right to defend himself against death or serious bodily harm. As we all know, self-preservation is the first law of nature. In order to justify the use of a dangerous weapon in self-defense it must appear that the defendant was so circumscribed or so situated that he honestly believed and that he had a reasonable ground for such belief that he could not save himself from serious bodily harm except by the use of self-defense. And even in self-defense a person may not use any greater force than is necessary to defend himself." (Tr. 165).

This instruction was initially objected to by defense counsel (Tr. 149, 150). No objection was made to it at the end of the charge or when part of the quoted language was repeated to the jury in response to a question (Tr. 174, 176-177).

STATUTES AND RULE INVOLVED

Title 22, District of Columbia Code, § 502 provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous wepon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, § 504 provides:

> Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months, or both.

Rule 31(c), Federal Rules of Criminal Procedure, provides:

> (c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

SUMMARY OF ARGUMENT

The trial court correctly refused to instruct the jury on simple assault. The jury should be instructed on a lesser included offense only where there is evidence to support the lesser charge. The Government's evidence in this case clearly showed an assault with a dangerous weapon. The defendant admitted such an assault but claimed self-defense. The only theory on which the jury could have found the defendant guilty of simple assault is that a soft-drink bottle, wielded as a club and used to inflict physical injury requiring medical treatment, is not a

dangerous weapon within the meaning of D.C. Code § 22-502. Such a theory is defective in law and has been repudiated by this Court.

When the trial court's instructions to the jury on the circumstances in which a dangerous weapon may be used in self-defense are read in context, it is evident that the court did not prejudge the issue of whether an assault with a dangerous weapon had been committed. The contention to the contrary was recently considered and rejected by this Court. In any event, no adequate objection, permitting the trial court to correct its alleged error, was made below.

ARGUMENT

I. The District Court's refusal to instruct on simple assault was correct.

(See Tr. 13, 15, 16, 48, 52, 71, 83, 84, 97, 103, 104, 117, 135, 137, 148.)

At the close of the evidence, appellant's counsel requested the court to instruct the jury on the lesser included offense of simple assault, D.C. Code § 22-504 (1961). The court overruled this request, saying, "it is assault with a dangerous weapon or nothing" (Tr. 148). This ruling, assigned by appellant as error, was correct.

It has long been held, on high authority, that the jury in a criminal trial should be instructed on a lesser included offense only in cases where there is evidence to support the lesser charge. *Sparf* v. *United States*, 156 U.S. 51 (1895). Where there is no evidence to support the lesser charge, not only is the court not required to give the instruction, but it errs if it does so, *Green* v. *United States*, 95 U.S. App. D.C. 45, 218 F.2d 856 (1955), and the error may be incurable, see *Green* v. *United States*, 355 U.S. 184 (1957).

Specifically, when the defendant is charged with assault with a dangerous weapon, the trial court should not instruct the jury on the lesser included offense of simple

assault in the absence of evidence that the alleged assault was committed by any other means than a dangerous weapon. *MacIllrath* v. *United States*, 88 U.S. App. D.C. 270, 188 F.2d 1009 (1951); *Burcham* v. *United States*, 82 U.S. App. D.C. 283, 163 F.2d 761 (1947); *United States* v. *Strassman*, 241 F.2d 784 (2d Cir. 1957); *Hickey* v. *United States*, 168 Fed. 536 (9th Cir. 1909).

In *MacIllrath* v. *United States*, *supra*, the defendant was convicted of assaulting three persons with a pistol, shooting one and clubbing two others. He admitted these acts, but claimed self-defense and accident. This Court held that the trial court did not err in failing to give instructions on simple assault, either as to the shooting or as to the striking. The Court said:

> "The rule [Fed. R. Crim. P. 31(c)] does not in terms require the instruction. If there is no evidence to justify a verdict of simple assault a jury should not be so instructed. *Burcham* v. *United States*, 1947, 82 U.S. App. D.C. 283, 163 F.2d 761. To do so would only tend to confuse and mislead the jury.
>
> "Obviously the shooting, if not accidental, was nothing less than an assault with a dangerous weapon. We also think the pistol used as a club in the violent manner shown by the evidence was still a dangerous weapon." 88 U.S. App. D.C. at 270-271, 188 F.2d at 1009-1010.

Similarly, the Ninth Circuit, in *Hickey* v. *United States*, *supra*, affirming a conviction of assault with a dangerous weapon, said:

> "It is very apparent, however, from the testimony, that defendant was either guilty of the offense charged or he was not guilty at all. There is not the slightest doubt that he assaulted Powell with a revolver, using it as a club. Indeed, he admits this himself. That such an instrument, so used, is a dangerous weapon, no one will question. So that, the assault being established, there was but one defense, namely, that the defendant was justifiable in making it. If justifiable, he was not guilty; but, whether guilty or not guilty was a question for the jury.

> There was no room, therefore, for the jury to find the defendant guilty of a lesser offense than assault with a dangerous weapon, and the court rightly refused to submit the question to them." 168 Fed. at 538.

In the present case there is no evidence that appellant assaulted the complaining witness, Mr. Ivory, by any other means than a soft-drink bottle used as a club. The defendant admitted striking Mr. Ivory with a bottle but claimed self defense. The only eye-witness at trial who did not see appellant strike Mr. Ivory with a bottle, co-defendant Taggart, did not see appellant strike Mr. Ivory at all. Thus, the testimony would have supported only three findings on this issue, and no others: 1) that appellant assaulted Mr. Ivory with a bottle; 2) that appellant assaulted Mr. Ivory with a bottle, but acted in self-defense; 3) that appellant did not assault Mr. Ivory. The choice among these three findings would depend on the credibility of the witnesses, which the jury below resolved against the appellant. Beyond that, there is simply no evidence that, if appellant committed an assault, he committed it without the use of a bottle.[2]

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[2] Even if, as appellant says in his brief, instructions on a lesser included offense must be given although the evidence in support of that offense is "implausible, unreliable, and incredible" and its source "of dubious reliability," this assertion and the supporting citations of *Young* v. *United States*, 114 U.S. App. D.C. 42, 309 F.2d 662 (1962), and *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963), do not advance his argument in the present case. In *Young*, the defendant, charged with assault with intent to rob, testified that he grabbed the complaining witness not to relieve him of his money but to disarm him. This testimony, admitting the assault but denying the specific intent required by the greater charge, if believed, created an evidentiary basis, however insubstantial, for a conviction of simple assault. In *Hunt*, the defendant was convicted of robbery. This Court, reversing, held that there was no substantial evidence that he had obtained possession of the complaining witness' wallet by means of robbery. There was substantial evidence, however, that he and his accomplice had come into possession of the wallet, knowing it belonged to the complaining witness and intending permanently to dispossess her of it. Accordingly, the court remanded for a new trial on the lesser included offense of larcency. In neither case was there no evidence that the lesser offense had been committed.

Thus, the only theory on which the jury could have found the defendant guilty of simple assault is that a soft-drink bottle, wielded as a club and used to inflict physical injury requiring medical treatment, is not a dangerous weapon within the meaning of D.C. Code § 22-502.[3] Such a theory was rejected out of hand by this Court in *Williams* v. *United States*, —— U.S. App. D.C. ——, 328 F.2d 178 (1963). In that case, the government's evidence showed that the defendant hit the complaining witness in the left side of the head with a beer bottle and in the face with a stool. The medical testimony showed that the complaining witness sustained "a two-inch laceration on the left side of the forehead," requiring "suture repair." *Id.*, No. 17,964, Brief for Appellee, p. 4, Tr. 326. The defendant did not remember striking the complaining witness, but testified that if he did, it happened accidentally while he was retreating from an unlawful assault by another. *Id.*, No. 17,964, Brief for Appellee, p. 3, Tr. 206-208. The trial court refused to charge the jury on the lesser included offense of simple assault, and the jury found the defendant guilty of assault with a dangerous weapon. This court upheld the trial court's ruling, saying, in pertinent part, that "there was insufficient evidence of simple assault to have justified a verdict of guilty of that offense." —— U.S. App. D.C. at ——, 328 F.2d at 179. The present case is factually indistinguishable.

A verdict of guilty of an offense less than assault with a dangerous weapon in this case would have been in flagrant disregard of all the evidence and in violation of

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[3] The dangerous capabilities of a bottle wielded as club are gruesomely substantiated by the record in *Thornton* v. *United States*, 106 U.S. App. D.C. 7, 268 F.2d 583 (1959). Appellant is in no position to complain if his unlawful assault upon Mr. Ivory did not produce more serious injuries than it did. See *McGill* v. *United States*, 106 U.S. App. D.C. 136, 138, 270 F.2d 329, 331 (1959), *cert. denied*, 362 U.S. 905 (1960): "[T]he fact that the attempt to pistol-whip the complaining witness did not result in physical injury does not make the action any less an assault with a dangerous weapon."

the jurors' duty to render a true verdict according to the facts adduced from the witness stand. Such a verdict would have been nothing more than the jury's method of limiting the punishment prescribed by law, an unlawful compromise whose asserted legality was authoritatively laid to rest in *Sparf* v. *United States*, *supra*. Accord, *Green* v. *United States*, 95 U.S. App. D.C. 45, 218 F.2d 856 (1955).

II. The District Court's instructions on self-defense were legally correct, did not prejudge any factual issue which should have been left to the jury's determination, and were not properly objected to below.

(See Tr. 149, 154-159, 163-166, 170-172, 174-177)

Appellant argues that the trial court's instructions to the jury were erroneous. Significantly, however, he does not attack the substance of the instructions or suggest that they enunciated erroneous principles of law either as to assault with a dangerous weapon or as to simple assault. Certainly the evidence supported the instructions given and the trial court would have been amiss to have omitted the portion complained of.

Appellant claims, however, that the charge "assumed the use of a dangerous weapon." (Br. 5). Although the authorities hereinbefore cited suggest that such an assumption would have been proper in this case, a reading of the entire charge to the jury demonstrates that the trial judge did not withdraw any factual issue from the jury. Appellant's argument requires him to lift part of the self-defense instructions out of context and to ignore other parts of the charge which refute his contention. Thus, the trial court instructed the jury that it was their duty "to determine the issues of fact. . . . [Y]ou are the sole judges of the facts and you must determine the facts for yourselves solely upon the evidence presented at the trial." (Tr. 154). This was repeated later on (Tr. 171). Elsewhere, the court defined a dangerous weapon

to the jury and charged: "If you find that the defendants or either of them committed an assault upon Clarence Ivory with a bottle and you find that the bottle was a dangerous weapon, then that would come within the definition of the statute of an assault with a dangerous weapon." (Tr. 164). It is difficult to see how the phraseology of the court in a succeeding paragraph would have foreclosed, in the jury's mind, the factual issue posed for their determination, especially in view of the fact that the court immediately went on to emphasize the Government's duty to prove each and every element of the offense beyond a reasonable doubt including the burden of negating the defendant's claim of self-defense (Tr. 165-166).

The same argument made by appellant in the instant case was considered and rejected by this Court in *Mathis* v. *United States*, 112 U.S. App. D.C. 161, 300 F.2d 916 (1962). In that case, the complaining witness testified that the defendant threw lye in her face. The defendant testified that the complaining witness had held the lye in her hand and threatened him with it, so he kicked it out of her hand, accidentally splashing her face. The trial court, over objection, charged the jury on self-defense in language essentially identical to that used in the present case. See *Mathis* v. *United States*, No. 16361, Joint Appendix p. 57, Tr. 176-177. The defendant was convicted of assault with a dangerous weapon and mayhem. This Court, in the face of the same argument as in the instant case, affirmed *per curiam*.

It should be noted that appellant's trial counsel, who also represents him on this appeal, never particularized his objection to the self-defense instructions below. His only objection to that portion of the charge was made at the bench after the Assistant United States Attorney had inquired whether the trial judge intended to instruct on reasonable force and the court began to read its proposed instructions to counsel. In the middle of the reading, defense counsel interjected, "I object to that," but did not state the grounds for his objection or the manner in which he desired the court to alter the instruction (Tr. 149).

Under the circumstances, it would have been quite natural for the trial court to understand his objection as going to the substance of this "stock" instruction, not to what he now describes as the prejudgment of a factual issue. Since the trial court was not informed of the nature of defense counsel's objection and since defense counsel never renewed or explained that objection at the close of the charge to the jury but announced "satisfied" (Tr. 174), his tardy articulation in this court of the theory of his objection must breast the current of Federal Rules of Criminal Procedure 30 and 51.[4]

CONCLUSION

The evidence of guilt in this case was substantial. The claim of self-defense was flimsy. Nothing in the charge to the jury was prejudicial or erroneous. Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
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[4] "INSTRUCTION. * * * No party may assign as error any portion of the charge or ommission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." *Fed. R. Crim. P.* 30.

"EXCEPTIONS UNNECESSARY. Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor * * *." *Fed. R.Crim. P.* 51.

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